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No. 93-68

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In the Supreme Court of the United States

OCTOBER TERM, 1993

PAUL D. DOUCETTE, PETITIONER

v.

UNITED STATES OF AMERICA
(AND OTHER CASES)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

MEMORANDUM FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, prohibits Congress from authorizing the Judge Advocates General to select commissioned officers in the military as court-martial trial judges and judges of the courts of military review.

2. Whether due process requires that military judges have fixed terms of office.

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This petition was filed on behalf of 26 different servicemembers from the Army, Navy, and Marine Corps. Petitioners were convicted at separate trials of offenses under the Uniform Code of Military Justice. Petitioners raise two claims. First, they argue that the military trial and appellate judges in their cases were not qualified to hold those positions because they were appointed to them by the Judge Advocates General in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. Second, petitioners claim that their trials and appeals to the courts of military review were fundamentally unfair because the military judges sitting on those courts do not enjoy a fixed term of office and can be reassigned to other military duties by the Judge Advocate

General based on his evaluation of their performance as judges.

Ordinarily, we would summarize for the Court the proceedings below and, in the course of doing so, explain whether the questions presented in the certiorari petition were pressed in or passed on by the courts below, as directed by Rule 15.1 of this Court's Rules. See, *e.g.*, *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 815-816 (1985). In light of the large number of petitioners who have joined in this petition, however, that course is not feasible in this case. We note, however, that the Court of Military Appeals passed on the questions presented in this petition in most, if not all, of the cases consolidated in this petition.[1] In addition, as a matter of judicial economy, effective January 6, 1993, the Court of Military Appeals has followed the course of denying petitions for review that raise only the claims adjudicated by that court in *United States* v. *Weiss*, 36 M.J. 224 (C.M.A. 1992), cert. granted, No. 92-1482 (May 24, 1993). With respect to petitions in which review is denied, that court has stated that it will accept out-of-time requests for relief in the event that this Court grants relief in the *Weiss* case. *United States* v. *Rice*, 36 M.J. 264 (1993), *reprinted at* Pet. App. 91a-92a. It also appears that the Court of Military Appeals will follow the same rule for any petitioners who timely raised the due process issue before it. *United States* v. *Schneider*, 36 M.J. 364 (C.M.A. 1993).[2]

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[1] While petitioners maintain that all of them raised (at least) the Appointments Clause question, Pet. 3, the orders of the Court of Military Appeals entered in the cases of petitioners Klinko and Williams do not indicate that that court ruled on that claim. Pet. App. 105a, 107a.

[2] The Court of Military Appeals did not, however, state whether it would excuse a defendant's failure properly to preserve such claims.

On the merits, petitioners' claims are not materially different from the two questions presented in *Weiss* v. *United States*, cert. granted, No. 92-1482 (May 24, 1993), which this Court has already decided to hear. Accordingly, we believe that the Court should hold the certiorari petition in these cases pending its decision in *Weiss* and then should dispose of this petition as appropriate in light of the Court's decision in that case.

Respectfully submitted.

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